No. 75-843

In the Supreme Court of the United States

OCTOBER TERM, 1975

TIMOTHY C. BENISH AND MICHAEL GAICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the evidence was insufficient to support their conviction; that their actions did not come within the scope of the statute under which they were convicted; and that the Attorney General unlawfully delegated his authority under the statute.

Following a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of distributing phendimetrazine, a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Each was sentenced to two years' probation and a $500 fine. The court of appeals affirmed (Pet. App. A).

The evidence showed that on July 25, 1973, an undercover agent of the Bureau of Narcotics and Dangerous Drugs met with petitioner Benish and indicated that he

desired to purchase large quantities of "black beauties" (Tr. 6-10). Benish said that he did not have a large quantity of the capsules with him, but could obtain them from his source, and that the capsules were "real dynamite" (Tr. 10). Benish gave the agent nine capsules as samples (Tr. 11-12) and agreed to obtain 10,000 capsules for future delivery (Tr. 9, 15-16); the agent agreed to pay 22 1/2 cents per capsule (Tr. 14).

On the evening of August 1, 1973, the agent again met with petitioner Benish. At first Benish refused to deliver the capsules directly to the agent. After some discussion, Benish and the agent drove to a parking lot where they met petitioner Gaich, who was in possession of two large plastic bags containing a total of 10,000 capsules (Tr. 18-19, 25-27). After examining the capsules, the agent paid $2,250 to petitioners and then departed with the capsules (Tr. 27). Subsequent laboratory analysis showed that the capsules contained phendimetrazine, a controlled substance.

1. Petitioners contend that the evidence was insufficient to support their conviction, since the government failed to prove that petitioners knew that the capsules contained phendimetrazine and that they knew that phendimetrazine is a controlled substance.

21 U.S.C. 841(a)(1) makes it unlawful "knowingly or intentionally * * * to * * * distribute * * * a controlled substance." To establish a violation, the government must prove that the defendant knowingly or intentionally distributed a substance, and that the substance is controlled. It is not necessary, however, also to prove that the defendant knew the generic name of the substance or that it is controlled. *United States* v. *Davis*, 501 F.2d 1344, 1346 (C.A. 9); cf. *United States* v. *Weiler*, 458 F.2d 474 (C.A. 3). To require such additional

proof would defeat the purpose of the federal regulation of dangerous drugs. Where, as here, "dangerous or deleterious devices or products * * * are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of [their] regulation." *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565; cf. *United States* v. *Freed*, 401 U.S. 601; *United States* v. *Balint*, 258 U.S. 250, 254.

In the instant case, the evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), was sufficient to establish that petitioners knowingly and intentionally distributed a substance which they knew to have certain characteristics and that the generic name of a substance with those characteristics is phendimetrazine. The sale was conducted in a clandestine manner; petitioner Benish indicated that he had sold the drug before, that he had experienced its effects, and that the government agent would find it to be "dynamite." The drug was phendimetrazine.

2. Petitioners further contend that their distribution of phendimetrazine on August 1, 1973, did not come within the scope of 21 U.S.C. 841(a)(1).

On June 15, 1973, phendimetrazine was added to the list of Schedule III controlled substances by order of the Director of the Bureau of Narcotics and Dangerous Drugs (38 Fed. Reg. 15719-15722). This order provided that anyone distributing or proposing to distribute phendimetrazine after that date must "obtain a registration to conduct that activity on or before August 1, 1973" (*id.* at 15722). In the interim a non-registered person could continue "to conduct normal business or profes-

sional practice" in the drug only if he were "entitled to registration" (*ibid.*).[1]

Contrary to petitioners' assertion, the interim provision did not permit anyone distributing such controlled substances or proposing to distribute them to obtain a registration to conduct such activity on or before August 1, 1973. To the contrary, by its terms, an unregistered distributor lawfully could distribute a controlled substance between June 15 and August 1 only if he were "entitled to registration" during that interim period. Petitioners, who did not register, failed to show that they were "entitled to registration."

It was not necessary for the government to allege and prove that petitioners did not come within this exception. "[I]t is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357; *United States* v. *Kelly*, 500 F.2d 72, 73 (C.A. 7).[2]

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[1]The order, in pertinent part, provides that *(ibid.)*:

> Any activity with * * * phendimetrazine * * * conducted after June 15, 1973, shall be unlawful, except that any person who is not now registered to handle these substances but who is entitled to registration * * * may continue to conduct normal business or professional practice with those substances between the date on which this order is published and the date on which he obtains the proper registration.

Pursuant to 21 U.S.C. 823(e), the Attorney General is required to register an applicant to distribute a Schedule III controlled substance "unless he determines that the issuance of such registration is inconsistent with the public interest" because, *inter alia*, it would divert the substance "into other than legitimate medical, scientific, and industrial channels."

[2]Petitioners' reliance (Pet. 13) on *Turner* v. *United States*, 396 U.S. 398; *Leary* v. *United States*, 395 U.S. 6; and *Tot* v. *United States*, 319 U.S. 463, is misplaced, since in those cases the statutory presumptions permitted the jury to presume proof of one element of the offense on the basis of proof of another. Here, however, the government must sustain the burden of proof as to all elements of the offense; only the burden of showing an affirmative defense is placed on the defendant.

3. Finally, contrary to petitioners' contention, Congress authorized the Attorney General to delegate to other officers of the United States Department of Justice his authority to place drugs on the controlled drug schedules.

Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1242, 21 U.S.C. 801 *et seq.*) authorizes the Attorney General to add or to remove drugs from the schedules of controlled substances (21 U.S.C. 811), and permits the Attorney General to "delegate any of his functions * * * to any officer or employee of the Department of Justice" (21 U.S.C. 871(a)). Pursuant to this provision, the Attorney General has delegated the "[f]unctions vested in [him]" under that Act to the Administrator of the Drug Enforcement Administration (formerly Director of the Bureau of Narcotics and Dangerous Drugs) (28 C.F.R. 0.100).[3]

[3]Petitioners' reliance (Pet. 17) on *United States* v. *Giordano*, 416 U.S. 505, is misplaced. There, this Court held that the statute generally authorizing the Attorney General to delegate his functions (28 U.S.C. 510) was inapplicable to applications for court orders authorizing wiretaps, because in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress expressly limited delegation of the Attorney General's authority to apply for such court orders to "any Assistant Attorney General specially designated by the Attorney General" (18 U.S.C. 2516(1)). By contrast, the Comprehensive Drug Abuse Prevention and Control Act places no limitation on delegation of the Attorney General's authority to place drugs on the controlled drug schedules. In fact, it authorizes the Attorney General to designate *any* officer or employee of the Department of Justice to place drugs on the schedules of controlled substances. See *United States* v. *Nocar*, 497 F.2d 719, 723 (C.A. 7), certiorari denied, 419 U.S. 1038.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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